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Before

The Committee on Government Reform
Subcommittee on Regulatory Affairs
House of Representatives

July 27, 2005

on
"The Effectiveness of Federal Regulatory Reform Initiatives"

Madam Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss the effectiveness of previous efforts to reform the federal rulemaking process, most of which have been attempted during the past 25 years. These reform efforts have had vastly different purposes and targets, and my comments today should not be interpreted as either the Congressional Research Service or me personally being in support of or in opposition to any of them. Also, each of the reforms can be viewed from different perspectives (e.g., burden reduction, improvement in regulatory effectiveness, greater cost-effectiveness), so different people may have differing criteria for what constitutes the "effectiveness" of a reform initiative. In my testimony, I will simply compare the stated or apparent intentions of the authors of these reforms with the results that have been achieved.

In brief, it appears that most of the more prominent of these regulatory reform efforts have not achieved the results that their authors intended. There appear to be at least four general reasons why this is so:

First, a substantial amount of discretion is sometimes left in the hands of rulemaking agencies, either directly through language in statutes and executive orders allowing agencies to decide how to proceed, or indirectly because of a lack of definition of key terms that determine whether and how certain actions are to be taken.

Second, there is tendency to build new regulatory reforms on the flawed foundations of earlier reforms, thereby causing the new reforms to have the same flaws and limitations as the old ones.

Third, the scope of some of the reform requirements is limited in terms of the agencies or rules covered, resulting in some reforms covering only a minority of all rules that could conceivably be covered.

Fourth, political or structural limitations of the environment in which the reforms were offered can make it difficult or impossible for the reforms to achieve their intended purposes.

Before exploring each of these reasons in detail, I will briefly discuss some of the major types of regulatory reforms that have been attempted in recent decades.

Types of Regulatory Reform Initiatives

Efforts in recent decades to reform the federal regulatory process have had many different purposes — as many purposes as the problems that those reforms were intended to fix. Although these reforms are too varied for all of them to be neatly categorized, many of the more significant ones fall into three general areas: (1) efforts to require agencies to perform certain types of regulatory analysis during the rulemaking process; (2) reforms intended to give Congress or the President better control over rulemaking agencies' activities; and (3) attempts to require reviews existing rules.

Regulatory Analysis Requirements

Perhaps the most common argument cited by proponents of regulatory reform is that the costs associated with the implementation regulations often outweigh the benefits that those regulations were intended to provide (e.g., cleaner environment, safer workplaces). Another, and somewhat related, view is that more carefully crafted regulatory policies could achieve the same benefits at less cost (or achieve more ambitious goals at the same cost). To improve the effectiveness of federal rules and minimize burdens, regulatory reform proponents have frequently advocated that agencies use (or make greater use of) a range of analytic tools during the rulemaking process, including cost-benefit analysis, cost-effectiveness analysis, and risk assessment. The underlying concept is that by considering all alternatives; quantifying costs, benefits, and risk to the extent possible; and making decisions based on the resultant information, unnecessary regulation can be avoided and regulatory burden can be minimized. Others, however, have pointed out that

the data to perform these analyses are often unavailable, and that regulatory costs are often easier to measure (particularly in monetary terms) than regulatory benefits, leading to an understatement of those benefits.

Within the past 25 years, both Congress and all recent Presidents have attempted to put in place regulatory analysis requirements. The most generally applicable cost-benefit analysis requirements in the rulemaking process are found in Executive Order 12866, issued by President Clinton in 1993,[1] but are primarily traceable to President Reagan's Executive Order 12291, issued in February 1981.[2] In the Clinton executive order, agencies are generally allowed to issue new regulations only upon a "reasoned determination that the benefits of the intended regulation justify its costs,"[3] and are required to tailor regulations to impose the least burden on society needed to achieve the regulatory objective. The order also requires a cost-benefit analysis for all "economically significant" rules (e.g., rules with a $100 million impact on the economy) containing an assessment of the anticipated costs and benefits of the regulatory action and an assessment of the costs and benefits of alternatives to the regulatory action, with an explanation of why the planned action is preferable. The Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) is required to oversee agencies' implementation of these requirements to ensure that the analyses are done and done properly.

Congress has also required federal regulatory agencies to analyze the effects of their rules before they are issued. Some of these requirements are potentially applicable to a range of regulations, while others are focused on particular types of rules. Some of the earliest such analytic requirements are contained in the Regulatory Flexibility Act (RFA) of 1980 (5 U.S.C. 601- 612). The RFA generally requires federal agencies to assess the impact of their forthcoming regulations on "small entities," which the act defines as including small businesses, small governmental jurisdictions, and certain small not-for-profit organizations. The RFA requires the analysis to describe, among other things, (1) the reasons why the regulatory action is being considered; (2) the small entities to which the proposed rule will apply and, where feasible, an estimate of their number; (3) the projected reporting, recordkeeping, and other compliance requirements of the proposed rule; and (4) any significant alternatives to the rule that would accomplish the statutory objectives while minimizing the impact on small entities.

Some of the broadest of these congressionally established analytical requirements are in title II of the Unfunded Mandates Reform Act (UMRA) of 1995 (2 U.S.C. 1532-1538).[4] Before promulgating a rule containing a mandate that may result in the expenditure of $100 million or more by the private sector or state, local, and tribal

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[1] Executive Order 12866, "Regulatory Planning and Review," *58 Federal Register* 51735, Oct. 4, 1993. To view a copy of this order, see [http://www.whitehouse.gov/omb/inforeg/eo12866.pdf].

[2] Executive Order 12291, "Federal Regulation," 46 *Federal Register* 13193, Feb. 19, 1981.

[3] The standard in Executive Order 12291 was that regulatory benefits "outweigh" costs, not just that there be a "reasoned determination" that they "justify" those costs.

[4] Title I of UMRA contains requirements applicable to congressional consideration of bills containing mandates. For a more complete discussion of UMRA, see CRS Report RS20058, *Unfunded Mandates Reform Act Summarized*, by Keith Bea and Richard S. Beth.

governments in the aggregate, UMRA requires agencies (other than independent regulatory agencies) to prepare a written statement containing a "qualitative and quantitative assessment of the anticipated costs and benefits . . . as well as the effect of the Federal mandate on health, safety, and the natural environment."[5]

Presidential and Congressional Review of Rules

Another thrust of regulatory reform initiatives in recent decades has been that regulatory agencies' activities should be under greater control of either the President or the Congress. Every President since President Nixon has attempted to put in place some type of mechanism by which some part of the Executive Office of the President would review and approve agency rulemaking. The current presidential regulatory review requirements are in Executive Order 12866, which requires most agencies to submit all significant rules to OIRA for review and approval before they are published in the *Federal Register*. OIRA is generally required to complete its review within 90 days, and agencies are required to disclose the substantive changes made to their rules during OIRA's reviews. As was the case with the analytical requirements, these presidential review requirements are largely traceable to President Reagan's Executive Order 12291, issued in 1981.

Even earlier, in 1980, Congress enacted the Paperwork Reduction Act (PRA) (44 U.S.C. 3501-3520), which replaced the ineffective Federal Reports Act of 1942 and established OIRA within OMB to provide central agency leadership and oversight of government-wide efforts to reduce unnecessary paperwork and improve the management of information resources. The PRA also requires agencies to receive OIRA approval for each information collection request before it is implemented. Within legal limits, OIRA can disapprove any collection of information (and generally stop any associated regulation) if it believes the collection is inconsistent with the requirements of the PRA.[6] The 1995 amendments to the PRA required OIRA to set a goal of at least a 10% reduction in the government-wide paperwork burden-hour estimate for each of fiscal years 1996 and 1997, a 5% goal for each of the next four fiscal years, and annual agency goals that reduce burden to the "maximum practicable opportunity."

The most prominent attempt to exert direct congressional control over rulemaking agencies was the 1996 adoption of what has been termed the "Congressional Review Act" (CRA) (5 U.S.C. 801-808). The CRA established expedited procedures by which Congress may disapprove agencies' rules by enacting a joint resolution of disapproval, with subsequent presentation to the President for signature or veto.[7] Under the CRA,

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[5] Examples of independent regulatory agencies include the Federal Communications Commission, the Securities and Exchange Commission, or the Consumer Product Safety Commission.

[6] Independent regulatory agencies can, by majority vote, void any OIRA disapproval of a proposed collection of information. Also, OIRA disapproval does not overrule a specific statutory requirement that certain information be collected.

[7] For a detailed discussion of CRA procedures, see CRS report RL31160, *Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act*, by Richard S. Beth.

before any final rule can become effective it must be filed with each House of Congress and the Government Accountability Office (GAO). The act also requires federal agencies to submit to GAO and make available to each House of Congress a copy of any cost-benefit analysis prepared for the rule and a report on the agency's actions related to the RFA, UMRA, and any other relevant act or executive order. Within 60 days after Congress receives an agency's rule, excluding periods when Congress is in recess or adjournment, a Member of Congress can introduce a resolution of disapproval that, if adopted by both Houses and enacted into law, can nullify the rule, even if it has already gone into effect. Congressional disapproval under the CRA also prevents the agency from proposing to issue a "substantially similar" rule without subsequent statutory authorization.

Reviews of Existing Regulations

All of the reform efforts that I have mentioned thus far represent attempts to control the issuance of *new* rules. Many reform advocates point out that there is an enormous body of *existing* rules that impose significant burdens on business and other regulated entities. Therefore, they argue, regulatory reform must also include reviews of existing rules to ensure that they are still needed and to determine whether they can be revised to impose less burden.

Again, both Congress and all recent Presidents have either required agencies to review their existing rules for possible change, or have attempted to review those rules in other ways. For example, section 610 of the Regulatory Flexibility Act in 1980 required each federal agency to develop a plan for the review of its existing rules that have or will have a "significant economic impact on a substantial number of small entities." The purpose of this "look-back" review is to determine whether the rules should be continued without change or should be amended or rescinded to minimize their impact on small entities. Section 610 also requires agencies to publish a notice in the *Federal Register* inviting the public to comment on their reviews.

Executive Order 12866 also required agencies to reexamine their existing rules. According to the executive order, the purpose of the review is to make the agencies' regulatory programs more effective, less burdensome, or better aligned with the President's priorities and the principles specified in the order. Because of concerns that agencies were not taking this requirement seriously, President Clinton sent a memorandum to the heads of Cabinet departments and independent agencies in March 1995 directing them to, among other things, conduct a page-by-page review of all their regulations in force and eliminate or revise those that were outdated or in need of reform. In June 1995, the President announced that this effort had resulted in commitments to eliminate 16,000 pages from the CFR.[8]

[8] To view a copy of the March 1995 memorandum,see [http://frwebgate5.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=976296245140+0+0+0&WAISaction=retrieve]. For a discussion of this initiative, see U.S. General Accounting Office, *Regulatory Reform: Agencies' Efforts to Eliminate and Revise Rules Yield Mixed Results*, GAO/GGD-98-3, Oct. 2, 1997.

The most recent OIRA-directed reviews of existing rules have involved the general public in the review process. In May 2001, OIRA asked the public to nominate rules that it believed should be modified or rescinded.[9] In response, OIRA received 71 nominations from 33 commenters, and decided that 23 of the rules nominated merited "high priority review." In March 2002, OIRA again solicited public comments on regulations in need of reform, and in response received more than 300 suggestions from about 1,700 commenters, some of which suggested making rules more stringent or developing new rules. This time, OIRA forwarded the suggestions to the relevant federal agencies for review and prioritization. In February 2004, OIRA requested public nomination of promising regulatory reforms relevant to the manufacturing sector. Specifically, OIRA requested that commenters suggest reforms to regulations, guidance documents, or paperwork requirements that would "improve manufacturing regulation by reducing unnecessary costs, increasing effectiveness, enhancing competitiveness, reducing uncertainty and increasing flexibility." In two hearings this year, this Subcommittee has examined this effort and, more broadly, the impact that rules can have on manufacturing.

Why Regulatory Reforms Have Not Been More Effective

These and other regulatory reform efforts enacted in the past 25 years have almost always been introduced with great fanfare and even greater expectations. And in a few cases, the reforms appear to have achieved at least some of those expectations. For example, in 1996, Congress enacted the Small Business Regulatory Enforcement Fairness Act (SBREFA) to strengthen the implementation of the RFA. One part of SBREFA required the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) to convene panels and solicit the views of small businesses and other small entities *before* the agencies developed proposed rules that were likely to have a significant effect on small entities. By obtaining these views early in the process, before the agencies have become fixed on a particular approach, small entities reported to GAO that they were much more likely to have an impact on agencies' rules.[10] Other reforms may be having more subtle (and less detectable) effects on the rulemaking process. For example, some agencies have reported that, because of OIRA review under Executive Order 12866, they sometimes do not even submit regulations that they believe may be returned to them.

However, it appears that most of the regulatory reform initiatives implemented in the past 25 years or so have been less effective than their authors had initially hoped. Some have been less charitably described as failures.

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[9] OIRA said it requested the nominations in response to a requirement in section 628(a)(3) of the fiscal year 2000 Treasury and General Government Appropriations Act that required OMB to submit "recommendations for reform" with its report on the costs and benefits of federal regulations.

[10] U.S. General Accounting Office, *Regulatory Reform: Implementation of the Small Business Advocacy Review Panel Requirements*, GAO/GGD-98-36, March 18, 1998.

Agency Discretion in the Implementation of the Reform Requirements

One reason why some previous reform efforts have not been more effective appears related to the amount of discretion that agencies have been given in their implementation. In some cases, that discretion is directly provided to the agencies through statutory language (e.g., agencies "may" take certain actions, or are required to conduct an analysis "when feasible"). In other cases, the discretion is provided when the reform requirements are not clear, or when definitions of key terms are not provided.

It is important to recognize, however, that some measure of agency discretion in implementing the reforms is inevitable and necessary. Congress cannot anticipate all future scenarios, so it must rely on agencies to make certain decisions along the way. Also, agency implementation discretion is the flexibility that prevents the reform requirements from being imposed when there is no legitimate need for them.

One of the best known examples of a reform effort that gives agencies a great deal of discretion is the Regulatory Flexibility Act. The RFA generally requires federal agencies to assess the impact of their forthcoming regulations on small businesses and other small entities. However, the act also says that agencies do not have to conduct the analysis if the head of the issuing agency certifies that the proposed rule would not have a "significant economic impact on a substantial number of small entities." The RFA does not define "significant economic impact" or "substantial number of small entities," thereby giving federal agencies substantial discretion to determine when the act's analytical requirements are triggered.

Agencies frequently use the discretion that they have been given by the RFA. For example, in 1999, the Environmental Protection Agency issued a proposed rule that would have lowered the threshold for reporting the use of lead under the Toxic Release Inventory (TRI) program from 25,000 pounds to 10 pounds.[11] As a result, any business with 10 or more employees that used more than 10 pounds of lead per year in its manufacturing process would have to fill out a TRI report. By EPA's own estimates, the TRI report took more than 100 hours to fill out the first time, and lowering the reporting threshold would have swept in more than 5,000 small businesses, costing each of them about $7,500 the first year and more than $5,000 each subsequent year. Nevertheless, EPA certified that this rule would not have a "significant economic impact on a substantial number of small entities," so it did not trigger the requirements of the RFA.

Senator Bond asked GAO to examine EPA's compliance with the RFA, and in 2000 GAO concluded that EPA's policies — while setting a "high threshold" — were within the discretion that the RFA allows.[12] GAO pointed out that, under EPA's standards, a rule could impose *$10,000* in costs on *10,000* small businesses and still not trigger the RFA as long as those costs did not represent 1% of the businesses' annual revenue. GAO

[11] Environmental Protection Agency, "Lead and Lead Compounds," 64 *Federal Register* 42222, Aug. 3, 1999.

[12] U.S. General Accounting Office, *Regulatory Flexibility Act: Implementation in EPA Program Offices and Proposed Lead Rule*, GAO/GGD-00-193, Sept. 20, 2000.

also determined that since 1996, EPA had certified 96% of its rules as not having a significant impact on small entities. During this same period, the office of pesticides and the office of solid waste within EPA had certified *100%* of their rules.

Another consequence of the lack of definition of key terms in the RFA is that agencies differ greatly in how they interpret key terms under the act. As a result, the level of regulatory relief available to small entities varies from agency to agency. For nearly 15 years, GAO has recommended that Congress consider amending the RFA to require the development of criteria as to whether and how agencies should conduct analyses under the act.

The RFA is not the only regulatory reform statute that raises discretion-related issues. Other statutes provide agencies more discretion in how the reforms are implemented. For example, section 223 of SBREFA, entitled "Rights of Small Entities in Enforcement Actions," requires federal agencies regulating the activities of small entities to establish a policy or program by the end of March 1997 for the reduction and, under appropriate circumstances, the waiver of civil penalties on small entities. Section 223 also gives federal agencies substantial discretion in how these requirements are to be carried out. In 2001, GAO examined the implementation of section 223 and determined that the agencies were using that discretion.[13] Some of the agencies' policies covered some civil penalty enforcement actions involving small entities, but not others. Other policies gave small entities no more penalty relief than large entities. However, because the statute required agencies only to have a "policy" on civil penalty relief, GAO concluded that these agencies' policies of giving *no* additional penalty relief were within the discretion permitted under the statute. None of the agencies indicated that its penalty relief policies were prompted by SBREFA.

The Unfunded Mandates Reform Act also gives agencies a great deal of discretion in its implementation. For example, section 202 of UMRA requires agencies to prepare "written statements" containing, among other things, estimates of future compliance costs and any disproportionate budgetary effects "if and to the extent that the agency in its sole discretion determines that accurate estimates are reasonably feasible and that such effect is relevant and material." The statute gives agencies the same discretion regarding estimates of the effects of their rules on the national economy. Therefore, an agency can omit these estimates if, in its sole discretion, it considers them inaccurate, unfeasible, irrelevant, or immaterial. Likewise, section 203 requires agencies to develop plans to involve small governments in the development of regulatory proposals that have a "significant or unique" effect on those entities. Therefore, an agency that concludes that a rule's effect on small governments will not be "significant" or "unique" can avoid this requirement. None of the agencies that GAO reviewed in its 1998 report on UMRA had developed small government plans pursuant to section 203.[14]

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[13] U.S. General Accounting Office, *Regulatory Reform: Implementation of Selected Agencies' Civil Penalty Relief Policies for Small Entities*, GAO-01-280, Feb. 20, 2001.

[14] U.S. General Accounting Office, *Unfunded Mandates: Reform Act Has Had Little Effect on Agencies' Rulemaking Actions*, GAO/GGD-98-30, Feb. 4, 1998. Some agencies had such programs, but said they were not developed because of UMRA. No subsequent reviews of agency compliance with this provision have been conducted.

Presidents have also given agencies substantial discretion in the implementation of some of the requirements they have placed on rulemaking agencies. For example, in 1987, President Reagan issued Executive Order 12612 on "Federalism," which established a set of fundamental principles and criteria for executive departments and agencies to use when formulating and implementing policies that have federalism implications.[15] The executive order also required federal agencies to prepare a "federalism assessment" whenever the responsible agency official determines that a proposed policy had sufficient federalism implications to warrant the preparation of the assessment. The assessment was required to contain certain elements (e.g., identifying the extent to which the policy would impose additional costs or burdens on the states), and was to accompany any rule submitted to OMB for review under Executive Order 12866. However, GAO examined the implementation of Executive Order 12612 and, in 1999, concluded that it had little effect on agency rulemaking.[16] Agencies prepared few federalism assessments because they concluded that their rules would not have sufficient "federalism implications" to merit an analysis, *even when they also said that the rules preempted state or local law*. In 1999, President Clinton issued Executive Order 13132 on "Federalism," which revoked Executive Order 12612. Like its predecessor, though, the new executive order provides agencies with substantial flexibility to determine which of their actions have "federalism implications" and, therefore, when they should prepare a "federalism summary impact statement."

Agency discretion is present in most federal rulemaking requirements — even the most longstanding and revered of those requirements. For example, the Administrative Procedure Act (APA) of 1946, which established the basic "notice and comment" rulemaking process, allows agencies to issue final rules without a notice of proposed rulemaking (NPRM) if the agencies can demonstrate "good cause" — i.e., that allowing the public to comment is "impracticable, unnecessary, or not in the public interest." And use of the good cause exception makes sense in certain circumstances, such as when new flight restrictions were needed quickly in the wake of the September 11, 2001, terrorist attacks. However, there is also some evidence to suggest that agencies may be overusing this "good cause" exception. For example, in 1998, GAO reported that about half of the more than 4,600 final rules issued in 1997 had no notice of proposed rulemaking.[17] Although many of these rules involved administrative or technical issues that were not likely to generate comments, the agencies indicated that some of the rules without a notice would have a $100 million impact on the economy. In some cases, it was unclear why the agency could not have issued a proposed rule. For example, one agency indicated that its rule would be in the public interest, and that constituted "good cause" not to allow the public to comment on it. In other cases the agencies said issuing proposed rules was impracticable because of statutory or other deadlines that had already passed by the time the rule was issued.

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[15] Executive Order 12612, "Federalism," 52 *Federal Register* 41685, Oct. 30, 1987.

[16] U.S. General Accounting Office, *Federalism: Previous Initiatives Have Little Effect on Agency Rulemaking*, GAO/T-GGD-99-131, June 3, 1999.

[17] U.S. General Accounting Office, *Federal Rulemaking: Agencies Often Issued Final Actions Without Proposed Rules*, GAO/GGD-98-126, Aug. 31, 1998.

Linking Requirements to Ineffective Requirements

Another reason why some regulatory reform measures have not worked as well as some expected is that the reforms have been related to or built on other reforms with some of the above-mentioned problems. For example, the "look back" requirements in section 610 of the Regulatory Flexibility Act (mandating that agencies review certain rules within 10 years of their issuance) are triggered only when the rulemaking agency determines that a rule has a "significant economic impact on a substantial number of small entities." Therefore, if an agency concludes that its rule does *not* have a "significant" impact, or that the number of small entities affected is *not* "substantial," it can avoid section 610's requirements (as well as the analytic requirements in the RFA). For this and other reasons (e.g., a lack of clarity regarding key terms), studies of agencies' implementation of section 610 have consistently indicated that few of the required look-back reviews appear to be conducted.[18]

As I mentioned earlier, Congress enacted SBREFA in 1996 to strengthen the implementation of the RFA. Section 212 of SBREFA requires agencies to publish one or more small entity compliance guides for each rule or group of related rules for which the agency is required to prepare a final regulatory flexibility analysis under the RFA. However, because this provision in SBREFA was built on the RFA, the discretion inherent in the RFA regarding whether to conduct a regulatory flexibility analysis also applies to whether compliance guides must be developed. Therefore, if the agency concludes that the final rule would not, in its opinion, have a "significant" impact on a "substantial" number of small entities, the agency is not required to prepare a compliance guide.

Section 212 of SBREFA also gives agencies discretion more directly. For example, the statute says agencies "may" prepare separate guides covering groups or classes of similarly affected small entities, and "may" cooperate with associations of small entities to develop and distribute the guides. Agencies are given "sole discretion" in the use of plain language in the guides, and the statute does not indicate when the guides must be developed or how they must be published. As a result, under section 212, it would be possible for an agency to develop a *hard to understand* compliance guide *years after* a final rule is published with *no input* from small entities, and still be considered in compliance with the act. In 2001, GAO reviewed agencies' implementation of section 212 and concluded that the requirement did not appear to have had much of an impact on agencies' rulemaking actions.[19]

Even regulatory reforms that are regarded as effective can be adversely affected by their linkage to other rulemaking requirements. For example, the EPA and OSHA small business advocacy review panels that are required by SBREFA (and have been regarded as an effective way to influence rules before the agency becomes locked into a proposal) are only required when the agency determines that a rule might have a "significant

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[18] CRS Report RL32801, *Reexamining Rules: Section 610 of the Regulatory Flexibility Act*, by Curtis W. Copeland; General Accounting Office, *Regulatory Flexibility Act: Agencies Interpretations of Review Requirements Vary*, GAO/GGD-99-55, April 2, 1999.

[19] U.S. General Accounting Office, *Regulatory Reform: Compliance Guide Requirement Has Had Little Effect on Agency Practices*, GAO-02-172, Dec. 28, 2001.

economic impact on a substantial number of small entities." Therefore, if EPA and OSHA conclude that their forthcoming proposal would not, if implemented, have such an impact on small entities, they can avoid the panel requirement.

Limited Scope of Reform Requirements

Other regulatory reforms would arguably be more effective if their scope were broader. For example, when Congress enacted the Unfunded Mandates Reform Act in 1995, it was considered one of the most important efforts to constrain the imposition of new requirements on state and local governments and businesses without new resources to implement those requirements. And, there is some evidence to indicate that the requirements that Congress placed on itself in title I of the act have had that effect, at least with regard to state and local governments.[20] However, there is little direct evidence that the requirements placed on the agencies in title II of UMRA have had much, if any, effect on the rulemaking process. One reason involves the limited number of rules that the act covers.

> First, the statute says that UMRA does not cover any rules issued by independent regulatory agencies such as the Federal Communications Commission, the Securities and Exchange Commission, or the Consumer Product Safety Commission.
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> Second, the statute says that UMRA also does not apply to any rules issued without a previous notice of proposed rulemaking. As I indicated earlier, about half of all final rules are issued without an NPRM, so UMRA does not apply to any of those rules.
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> Third, UMRA says that agencies need not prepare a written statement containing (among other things) an estimate of benefits and costs if the rule in question imposes an enforceable duty only as part of a voluntary program or as a condition of federal financial assistance. A number of the programs that agencies consider "voluntary" (e.g., the No Child Left Behind Act) are not viewed that way by the states or other regulated entities.
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> Finally, the act says that agencies need not prepare an UMRA written statement if the rule will not require "expenditures" of at least $100 million. However, because some rules do not technically require "expenditures" (e.g., the rule may prevent the money from ever getting into the pockets of affected parties), UMRA does not cover them.

[20] Congressional Budget Office, "A Review of CBO's Activities Under the Unfunded Mandates Reform Act," testimony before the House Committee on Government Reform, March 8, 2005, available at [http://www.cbo.gov/showdoc.cfm?index=6141&sequence=0]. CBO said that although Congress has rarely used UMRA's explicit enforcement mechanisms, "it has changed several pieces of legislation before enactment to either eliminate mandates or lower costs."

When GAO examined the implementation of UMRA in 1998, it concluded that the act had little effect on agency rulemaking.[21] UMRA did not cover most of the rules that GAO examined with a $100 million impact on the economy. Even when a rule was covered, UMRA did not require the agency to do much more than it was already required to do under other statutes and executive orders. GAO reached a similar conclusion in its 2004 examination of UMRA's implementation.[22]

Some observers have also criticized the limited scope of the presidential review requirements in Executive Order 12866.[23] Like its predecessor (Executive Order 12291) and UMRA, the executive order covers only executive departments and independent agencies; it does not cover rules issued by independent regulatory agencies in such areas as telecommunications, energy, and trade with an estimated effect on the economy of more than $200 billion — roughly the same as the health, safety, and environmental rules that OIRA *does* review. Advocates of extending the executive order to independent regulatory agencies' rules point out that OIRA already reviews their information collection requests under the PRA, and argue that reviewing the substance of their rules would be a logical extension of that effort. Opponents note, however, that these agencies were established to be independent of the President, and argue that including them under the scope of the executive order would violate that independence.

Political/Structural Realities and Other Constraints

In other cases, the ineffectiveness of a reform effort may have more to do with political and structural realities, or other limitations in the rulemaking environment. For example, although the Congressional Review Act was initially viewed as a way for Congress to reassert itself in the rulemaking process, checking agencies' work to ensure consistency with the intent of underlying statutes, its implementation has been well short of that goal. To date, agencies have submitted more than 39,000 rules to Congress since the CRA was enacted in March 1996, including nearly 600 "major" rules, most with a $100 million impact on the economy. Although many of even the major rules were not controversial, dozens if not hundreds of the rules submitted to Congress were publicly opposed by a number of lawmakers, and nearly 50 resolutions of disapproval have been introduced since 1996. Nevertheless, only one rule has been reversed under CRA procedures — the Department of Labor's ergonomics rule in early 2001.

Although many reasons have been offered for the CRA's lack of use (e.g., the lack of expedited legislative procedures in the House, or the lack of a neutral organization to provide Congress with information about rules),[24] the primary reason appears to be the

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[21] U.S. General Accounting Office, *Unfunded Mandates: Reform Act Has Had Little Effect on Agencies' Rulemaking Actions*, GAO/GGD-98-30, Feb. 4, 1998.

[22] U.S. General Accounting Office, *Unfunded Mandates: Analysis of Reform Act Coverage*, GAO-04-637, May 12, 2004.

[23] The Center for Regulatory Effectiveness, "A Blueprint for OMB Review of Independent Agency Regulations," March 2002, available at [http://www.thecre.com/pdf/blueprint.pdf].

[24] See, for example, CRS Report RL30116, *Congressional Review of Agency Rulemaking: An Assessment after Nullifcation of OSHA's Ergonomics Standard*, by Morton Rosenberg.

balance of power between the Congress and the President. Under the CRA, if the President vetoes a joint resolution of disapproval regarding a rule *that has been approved by officials in his Administration*, it requires a two-thirds vote in both chambers for Congress to disapprove the rule over the President's objection. As a result, it is very difficult for Congress to use the CRA to disapprove a rule that the President would like to see go into effect. In fact, the only time that the CRA has been used to disapprove a rule — the ergonomics rule — was when the presidency changed hands, and the incoming President wanted to see the previous Administration's rule disapproved.

The Paperwork Reduction Act is an example of a different type of conflict — here, between conflicting goals. As I mentioned previously, the 1995 amendments to the PRA required OIRA to set burden reduction goals for the next six years that would have, if they had been met, reduced the amount of federal paperwork from about 7 billion burden hours at the end of fiscal year 1995 to about 4.6 billion hours by the end of fiscal year 2001. As you well know, this reduction did not occur. In fact, by the end of fiscal year 2002, the government-wide paperwork burden estimate stood at more than 8.2 billion hours.

Why didn't federal paperwork go down? A variety of answers are possible, including increases in the population of respondents and failures in the paperwork clearance process.[25] However, at least one answer appears to be that, at the same time agencies were being told to reduce paperwork, congressional and presidential initiatives were either directly or indirectly requiring the agencies to collect *more* paperwork. Perhaps the best illustration of this is the Internal Revenue Service (IRS), which is responsible for about 80% of the federal paperwork requirements. In recent years, IRS officials have stated that the agency's paperwork requirements have increased largely because of new statutes providing new tax breaks for individuals and businesses (e.g., the American Jobs Creation Act of 2004 and the Working Families Tax Relief Act of 2004) and creating new levels of complexity.[26] In order to determine whether taxpayers are deserving of such benefits, IRS requires additional information from them — thereby increasing the agency's estimated paperwork burden. Therefore, OIRA has concluded that IRS' burden reduction actions to represent the "maximum practicable opportunity" available to the agency, and are consistent with the burden reduction goals under the PRA.

Still other constraints to certain regulatory reform initiatives appear to be the primary statutes under which regulatory agencies operate. For example, although several regulatory reforms instruct agencies like EPA and OSHA to prepare cost-benefit analyses and to issue regulations only if the benefits justify the costs, the Clean Air Act and the Occupational Safety and Health Act do not permit the agencies to consider costs in the

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[25] U.S. Government Accountability Office, *Paperwork Reduction Act: New Approach May Be Needed to Reduce Government Burden on Public*, GAO-05-424. GAO determined that certain agencies were not carrying out all of their review responsibilities under the PRA.

[26] See, for example, Mark W. Everson, Commissioner of Internal Revenue, testimony before the House Committee on Government Reform's Subcommittee on Regulatory Affairs, May 25, 2005, available at [http://reform.house.gov/UploadedFiles/IRS_testimony_PW2005.TaxPolicy--AMS.doc].

development of health standards. Of course this reasoning does not explain why, in other cases, agencies' cost-benefit studies do not consider all reasonable alternative approaches, use questionable assumptions, or otherwise develop inadequate estimates of regulatory effects. The reasons for these problems are particular to each rule on which they are based, and need to be understood in that context.

Making Regulatory Reform More Effective

Although the preceding discussion of the effectiveness of regulatory reform efforts in recent decades is rather bleak, it is important to note that the reforms may be having at least some effects that are hard to detect. For example, the weaknesses of the RFA notwithstanding, some rulemaking agencies have indicated that the act and the related provisions in SBREFA have caused them to increase their consideration of the effect of their rules on small entities, and as a result have sometimes made those rules' requirements less burdensome. Strengthened regulatory reviews under Executive Order 12866 during this Administration have also reportedly caused agencies to rethink their proposals before submitting them to OIRA. Even recognizing these more subtle effects, though, it is apparent to most observers that few of the regulatory reforms enacted during the past quarter century are performing as well as their sponsors had hoped.

Some of what have been described here as weaknesses of the reform efforts may actually have been the result of hard wrought compromises in Congress. However, if Congress chooses to reinvigorate its regulatory reform efforts, several options seem available. Perhaps the clearest and most agreed upon approach would be to learn from the past, and not use the same methods that have previously led to unsatisfactory outcomes. For example, previous experience suggests that regulatory reform efforts that are *as specific as possible* regarding what Congress wants the agencies to do (i.e., defining key terms and not providing agencies broad discretion to determine when certain analyses or what procedures should be used) are more likely to be effective. When key terms are undefined, the regulatory agencies are implicitly given the discretion to define those terms as they see fit. When agencies are told they "may," at their discretion, take some action that requires substantial cost or effort on their part, at least some agencies will seek to avoid it. Just as regulated entities do when given compliance discretion, regulatory agencies can arguably be expected to select the approach that they consider to be the least burdensome to them.

Previous experience also suggests that Congress needs to carefully *consider whether new reforms should be built on or linked to other requirements that have been shown to be problematic*. For example, linking a reform requirement (e.g., compliance assistance, pre-proposal consultation) to another requirement that is discretionary (e.g., whether a rule will have a "significant" impact on small entities) will ensure that the linked requirement is also discretionary.

Another important consideration is the scope of the reform effort. Limitations on a reform's scope by *excluding certain types of agencies or rules can make the effort much less effective and influential*. For example, given that about half of all final rules are

issued without a notice of proposed rulemaking, it is worth considering whether a reform effort should include only rules for which an NPRM has been issued. Similarly, Congress may want to consider whether future reforms should exclude entire categories of agencies from those reforms' requirements, particularly when the excluded agencies' rules have a significant impact on society.

Lastly, where Congress wants the opinions of interested parties to be seriously considered, it may often be more effective to *focus any such reforms on agency actions early in the rulemaking process.* As the SBREFA panel process indicated, interested parties can be expected to have more influence on shaping a proposal and ensuring their views are taken into account before an NPRM is issued than afterward, when the agency's positions tend to harden.

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Madam Chairman, that concludes my prepared statement. I would be happy to answer any questions that you or other Members of the Subcommittee might have.